2502 COMMITMENT AS A SEXUALLY VIOLENT PERSON UNDER CHAPTER 980, WIS. STATS.

BEGIN WITH THE OPENING INSTRUCTIONS THAT WOULD BE USED IN A CRIMINAL CASE. MOST CAN BE USED WITHOUT CHANGE. INCLUDED IMMEDIATELY BELOW IS WIS JI-CRIMINAL 145 AND INCLUDED AT THE END IS WIS JI CRIMINAL 140, BOTH OF WHICH ARE MODIFIED FOR USE HERE.

A petition has been filed alleging that (name) is a sexually violent person. A sexually violent person is one who has been convicted of a sexually violent offense and is dangerous to others because he or she currently has a mental disorder that makes it more likely than not[1] that the person will engage in future acts of sexual violence.

You will now be asked to decide whether or not (name) is a sexually violent person.

The Petition

A petition is nothing more than a written, formal allegation that a person is a sexually violent person. You are not to consider it as evidence against (name) in any way.

State's Burden of Proof

Before you may find that (name) is a sexually violent person, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements are established.[2]

The Elements That Must be Proved

1. That (name) has been convicted of[3] a sexually violent offense.

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.

[(Name crime specified in § 980.01(6)(a)) is a sexually violent offense.][4]

[(Name crime specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[5] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[6]]

2. That (name) currently has a mental disorder.

"Mental disorder" as used here, means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence[7] and causes serious difficulty in controlling behavior.[8]

The term "mental disorder" is also used in a more general way by the mental health profession to diagnose and describe mental health-related symptoms and disabilities. Only those mental disorders that predispose a person to engage in acts of sexual violence and cause serious difficulty in controlling behavior are sufficient for purposes of commitment as a sexually violent person.[9]

You are not bound by medical opinions given by witnesses, or by labels or definitions used by witnesses, relating to what is or is not a mental disorder.[10]

3. That (name) is dangerous[11] to others because (he) (she) has a mental disorder which makes it more likely than not[12] that (he) (she) will engage in one or more[13] future acts of sexual violence.

Meaning of "Acts of Sexual Violence"

"Acts of sexual violence" means acts which would constitute "sexually

violent offenses."[14]

ELECT ONE OF THE FOLLOWING DEPENDING ON WHAT IS ALLEGED IN THE PETITION.[15]

[(Name crime or crimes specified in § 980.01(6)(a)) is a sexually violent offense.][16]

[(Name crime or crimes specified in § 980.01(6)(b)) may be a sexually violent offense if it is sexually motivated.[17] "Sexually motivated" means that one of the purposes for the offense was the actor's sexual arousal or gratification or the sexual humiliation or degradation of the victim.[18]]

ADD THE FOLLOWING IF EVIDENCE OF OTHER SEXUALLY VIOLENT OFFENSES HAS BEEN ADMITTED.

Evidence of Other Offenses

[Evidence has been submitted that (name) committed other sexually violent offenses before committing (identify offense on which the petition is based) . This evidence alone is not sufficient to establish that (name) has a mental disorder. Before you may find that (name) has a mental disorder, you must be so satisfied beyond a reasonable doubt from all the evidence in the case.[19]]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the state has proved all three elements, you should find that (name) is a sexually violent person.

If you are not so satisfied, you must not find that (name) is a sexually violent person.

State's Burden of Proof

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

The law presumes that (name) is not a sexually violent person. Furthermore, (name) does not have to prove anything. The burden is on the State to convince you beyond a reasonable doubt that (name) is a sexually violent person.

If you can reconcile the evidence upon any reasonable hypothesis consistent with (name) not being a sexually violent person, you should do so and find that (name) is not a sexually violent person.

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork, speculation, sympathy, or fear. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give (name) the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[20]

COMMENT

Wis JI-Criminal 2502 was originally published in 1995 and was revised in 1996, 1997, 1999, 2001, 2002, 2003, 2004, 2006, 2007, 2011, 2012, 2016, and 2021. The 2011 revision changed the definition of

"mental disorder" – see footnote 9. The 2016 revision added new footnote 20. This revision was approved by the Committee in February 2021; it added new footnote 14.

The 2007 revision of this instruction reflected changes made in Chapter 980 by 2005 Wisconsin Act 434, [effective date: August 1, 2006]. A significant change is the reduction from four elements to three. Former element 2 was deleted; it required that the jury find that the petition was filed within 90 days of the person's release from custody. The source of this requirement was State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, where the court held that this was a fact for the jury. See footnote 2, below. Thiel was based on the plain meaning of the statutes:

- § 980.05(3)(a) then required that the state prove "the allegations in the petition beyond a reasonable doubt"; and,
- § 980.02(2)(ag) identified the 90-day requirement as something that must be alleged in the petition.

Act 434 amended § 980.05(3)(a) as follows:

> (3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

Act 434 also repealed § 980.02(2)(ag).

Since Thiel was based on the plain meaning of the statutes, and since the statutes have been changed, the second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

Other significant changes made by 2005 Wisconsin Act 434 were:

- changes in the lists of "sexually violent offenses" in § 980.01(6)(a) and (b);
- creation of § 980.05(2m)(c), which allows trial by a jury less than 12 if the parties agree and the court approves;
- repeal of § 980.05(1m), which provided that "all constitutional rights available to a defendant in a criminal proceeding are available" to a person facing a Chapter 980 commitment; and,
- creation of §§ 980.031 - 980.038, which specify the procedures for the commitment hearing.

Before 2005 Wisconsin Act 434, significant changes in Chapter 980 had been made by 2003 Wisconsin Act 187. It amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. The effective date of Act 187 is April 22, 2004. Section 8 of the Act, Initial applicability, reads as follows:

> The treatment of section 980.01(1m) and (7) of the statutes, the renumbering and amendment of section 980.08(4) of the statutes, and the creation of section 980.08(4)(b)2. of the statutes first apply to hearings, trials, and proceedings that are commenced on the effective date of this subsection.

The changes made by Act 187 apply to all proceedings conducted on or after its effective date, including hearings held for individuals originally committed under Chapter 980 before the effective date.

State v. Tabor, 2005 WI 107, 282 Wis.2d 768, 699 N.W.2d 663.

This instruction is for the original commitment as a "sexually violent person" under chapter 980. Subsection 980.05(2) provides that "[t]he person who is the subject of the petition, the person's attorney, or the petitioner may request that a trial under this section be to a jury of 12." Subsection 980.03(3) provides that "[n]otwithstanding s. 980.05(2), if the person, the person's attorney, or the petitioner does not request a jury trial, the court may on its own motion require that the trial be to a jury." A verdict must be unanimous. § 980.03(3).

The 1995 version of this instruction was approved as a correct statement of the law in State v. Matek, 223 Wis.2d 611, 589 N.W.2d 441 (Ct. App. 1998). The court rejected the defendant's argument that the following statement should have been added to the instruction:

"Commitment must be based on a current diagnosis of a present disorder that specifically causes the person to be prone to sexually violent acts in the future."

The Committee believes the substance of the statement is included in the current version of the instruction, which was amended in 1999 to add the word "currently" to the statement of element 2. and to add the word "future" to the statement of element 3.

A Chapter 980 petition may be pursued against a person whose crime did not qualify as a Chapter 980 predicate offense at the time of conviction but did qualify at the time he neared the end of his sentence. State ex rel. Washington v. State, 2012 WI App 74, 343 Wis.2d 434, 819 N.W.2d 305.

In State v. Spaeth, 2014 WI 71, 355 Wis.2d 761, 850 N.W.2d 93, a petition for a Chapter 980 commitment was filed based on a conviction that was reversed while the petition was pending. The Wisconsin Supreme Court reversed the trial court's dismissal of the petition, holding that "the sufficiency of a Chapter 980 petition should be assessed as of the time of filing." 355 Wis.2d 761, ¶3. The court noted: "The fact that Spaeth's conviction was later overturned unquestionably impacts the strength of the State's case for his commitment, but this does not negate the validity of the State's petition at the time of the filing." 355 Wis.2d 761, ¶34.

Section 980.063(1) requires that if a person is found to be sexually violent person, the court shall require the person to provide a biological specimen for DNA analysis. 2013 Wisconsin Act 20 amended the statute to further require that "[t]he court shall inform the person that he or she may request expungement under s. 165.77(4)." The expungement referred to relates to inclusion in the DNA data bank.

See Wis JI-Criminal 2503 for a recommended verdict form. State v. Madison, 2004 WI App 46, 271 Wis.2d 218, 678 N.W.2d 607, rejected the argument that a special verdict was required in Chap. 980 cases either by § 805.12(1) or principles of equal protection. The court noted: ". . . our holding should not be read to conclude a respondent in a Wis. Stat. ch. 980 commitment proceeding should never have a special verdict." 271 Wis.2d 218, ¶10.

See Wis JI-Criminal 2505 and 2506 for instructions for the decision on discharge from a commitment under chapter 980.

The constitutionality of Wisconsin's Chapter 980 has been consistently upheld. To summarize, the challenges involve two types of claims. First, claims that the statutes violate protections against ex post facto laws and double jeopardy have been rejected on the basis that the statutes have a civil (treatment)

purpose, not a criminal (punitive) one. State v. Carpenter, 197 Wis.2d 252, 541 N.W.2d 105 (1995). The United States Supreme Court reached the same conclusion with respect to the Kansas law, which closely resembles Chapter 980. Kansas v. Hendricks, 521 U.S. 346 (1997). Second, claims based on due process and equal protection have been rejected on the basis that the statutes provide a sufficient definition of the "mental disorder" that is the predicate for a commitment. State v. Post, 197 Wis.2d 279, 541 N.W.2d 115 (1995); State v. Laxton, 2002 WI 82, 646 Wis.2d 185, 646 N.W.2d 784. Also see, Kansas v. Hendricks, supra, and Kansas v. Crane, 534 U.S. 407 (2002).

In State v. Rachels, 2002 WI 81, 646 Wis.2d 334, 646 N.W.2d 784, the court reaffirmed the constitutionality of Chapter 980 despite statutory changes made by 1999 Wisconsin Act 9. Those changes provided for automatic commitment to an institution and put limits on re examinations.

In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court rejected a due process challenge, summarizing its conclusion as follows:

> ¶40 . . . due process does not require proof of a recent overt act in evaluating the dangerousness of the offender when there has been a break in the offender's incarceration and the offender is reincarcerated for nonsexual behavior. Substantive due process allows for a chapter 980 commitment when there is sufficient evidence of current dangerousness. We decline to adopt any bright-line rule that requires current dangerousness to be proven by a particular type of evidence.

Equal protection principles do not require proof of a recent overt act for Chapter 980 commitments. See State v. Post, supra, and State v. Feldmann, 2007 WI App 35, 300 Wis.2d 474, 730 N.W.2d 440.

The State is not required to present expert testimony to prove element three—that a person is dangerous because his or her mental disorder makes it more likely than not that he or she will reoffend in a sexually violent manner. State v. Stephenson, 2020 WI 92, ¶¶19-29, 394 Wis. 2d 703, 951 N.W.2d 819. In Stephenson, the Wisconsin Supreme Court held that this element – regarding the likelihood the respondent will engage in future acts of sexual violence – is well within the province of the lay factfinder. Therefore, though expert testimony on the third element may inform the factfinder's decision, such testimony is not necessary to prove the element. While Stephenson involves a discharge proceeding rather than an original commitment, it also discusses more generally whether expert opinion testimony on dangerousness is required. In view of the Court's discussion, and given that the State must prove the same three elements in both original commitment and discharge proceedings, the Committee concluded Stephenson's holding also applies to original commitment proceedings.

In State v. Franklin, 2004 WI 38, 270 Wis.2d 271, 677 N.W.2d 276, the court held that "during a commitment proceeding under ch. 980, § 904.04(2) does not apply to evidence offered to prove that the respondent has a mental disorder that makes it substantially probable that the respondent will commit acts of sexual violence in the future." ¶1. The "other acts" evidence must, however, be relevant and not unfairly prejudicial. Franklin, supra, ¶16.

In State v. Sugden, 2010 WI App 166, ¶3, 330 Wis.2d 628, 795 N.W.2d 456, the court held that "the rule of completeness" did not require that an excluded part of the expert's report be put before the jury – that part stated that, if Sugden were released, his risk of reoffending was diminished by the fact that he would be supervised on parole for 22 years – until he was 74 years old.

Regarding appointments of experts under § 980.08(3) [for the court] and § 980.08(4) [for the person

facing commitment], see State v. Thiel, 2004 WI App 225, 277 Wis.2d 698, 691 N.W.2d 388.

In State v. Parrish, 2002 WI App 263, 258 Wis.2d 521, 654 N.W.2d 273, the court held that "claim preclusion" does not bar a Chapter 980 petition following revocation of parole where a pre parole revocation petition under Chapter 980 had been unsuccessful.

Several state appellate court decisions have addressed procedural matters relating to chapter 980 proceedings. In State v. Byers, 2003 WI 186, 263 Wis.2d 113, 665 N.W.2d 729, the court held that a district attorney may file Chapter 980 petition only if the Department of Corrections requests it and the Department of Justice decides not to file. A chapter 980 petition is timely if filed within 90 days of release from confinement based in any part on a sexually violent offense. State v. Keith, 216 Wis.2d 61, 573 N.W.2d 888 (Ct. App. 1997). Chapter 980 applies to crimes committed on the Lac Du Flambeau reservation. State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. The general guarantee of criminal-related constitutional rights in 980.05(1m) does not overrule the alternate provisions for venue in 980.02(4) and (5). State v. Tainter, 2002 WI App 296, 259 Wis.2d 387, 655 N.W.2d 538. If there is a finding that a person is an appropriate candidate for supervised release, it is an erroneous exercise of discretion to commit that person to a secure facility rather than developing a workable plan for supervised release. State v. Keding, 214 Wis.2d 362, 571 N.W.2d 450 (Ct. App. 1997). Because a sexual predator commitment is civil, the time limits for civil appeal, not a criminal appeal, apply. State v. Brunette, 212 Wis.2d 139, 567 N.W.2d 647 (Ct. App. 1997). In State v. Zanelli, 212 Wis.2d 358, 569 N.W.2d 301 (Ct. App. 1997), the court addressed a variety of issues relating to sexual predator commitment proceedings: timely filing of petition; filing did not breach the earlier plea agreement that did not mention chapter 980; "sworn" petition is not required; reference at the hearing to silence when interviewed was improper; chapter 980 hearings are within the exception to patient-psychologist privilege; the use of a previously-prepared presentence report is within the court's discretion; and the evidence is found to be sufficient to support the commitment. In State v. Treadway, 2002 WI App 195, 257 Wis.2d 467, 651 N.W.2d 334, the court addressed: the time for filing the petition; the number of peremptory challenges allowed; admissibility of a probation officer's opinion regarding the likelihood the individual would reoffend; and, the sufficiency of the evidence to establish that the individual was "a sexually violent person."

The rights and procedures in § 51.61 regarding court authorization of involuntary medication for committed persons not competent to refuse medication apply to persons committed under chapter 980. State v. Anthony D.B., 2000 WI 94, 237 Wis.2d 1, 614 N.W.2d 435.

1. 2003 Wisconsin Act 187 amended § 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created § 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout.

2. 2005 Wisconsin Act 434 amended § 980.05(3)(a) to provide that "the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person." Before the amendment, that statute required that the petitioner prove "the allegations in the petition" and § 980.02(2)(ag) required that the petition allege that it was filed within 90 days of the person's release from custody. State v. Thiel, 2000 WI 67, 235 Wis.2d 823, 612 N.W.2d 94, held that this was a fact for the jury. Thiel was based on the plain meaning of the statutes but those statutes were changed by Act 434. Since the statutes have been changed, the former second element of Wis JI-Criminal 2502 has been deleted and the number of elements reduced from four to three.

3. The instruction is drafted for a case alleging that the person has been "convicted of" a sexually

violent offense. But persons may also be committed under chapter 980 if they have been "found delinquent for a sexually violent offense" or "found not guilty of a sexually violent offense by reason of mental disease or defect." § 980.02(2)(a)2. and 3. If either of these other options is present, the appropriate term must be substituted for "convicted of" throughout the instruction.

4. Subsection 980.01(6)(a), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses":

- § 940.225(1) First Degree Sexual Assault
- § 940.225(2) Second Degree Sexual Assault
- § 948.225(3) Third Degree Sexual Assault
- § 948.02(1) First Degree Sexual Assault Of A Child
- § 948.02(2) Second Degree Sexual Assault Of A Child
- § 948.025 Repeated Acts Of Sexual Assault Of A Child
- § 948.06 Incest With A Child
- § 948.07 Child Enticement
- § 948.085 Sexual Assault Of A Child Placed In Substitute Care

2005 Wisconsin Act 434 also created subsection (6)(am) to include as a sexually violent offense: "An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a)." This is consistent with the conclusion reached in State v. Irish, 210 Wis.2d 107, 565 N.W.2d 161 (Ct. App. 1997), where the court held that a conviction for child enticement under former § 944.12 can be the predicate for a sexual predator commitment. A conviction under § 944.11(3), 1973 74 Wis. Stats., can be a "sexually violent offense" because the conduct remains prohibited under § 948.02(1), a statute listed in § 948.01(6). "The legislature clearly intended to include, within the definition of 'sexually violent offense,' the conduct prohibited under a previous version of a statute enumerated in Wis. Stat. § 980.01(6), as long as the conduct prohibited under the predecessor statutes remains prohibited under the current enumerated statute." State v. Pharm, 2000 WI App 167, ¶19, 238 Wis.2d 97, 617 N.W.2d 163.

5. Section 980.01(6)(b), as amended by 2005 Wisconsin Act 434, provides that the following crimes are "sexually violent offenses" if they were sexually motivated:

- § 940.01 First Degree Intentional Homicide
- § 940.02 First Degree Reckless Homicide
- § 940.03 Felony murder
- § 940.05 Second Degree Intentional Homicide
- § 940.06 Second Degree Reckless Homicide
- § 940.19(2) Battery [Substantial Battery With Intent To Cause Bodily Harm]
- § 940.19(4) Battery [Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.19(5) Battery [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.19(6) Battery [Substantial Risk Of Great Bodily Harm]
- § 940.195(4) Battery To An Unborn Child (Causing Great Bodily Harm With Intent To Cause Bodily Harm]
- § 940.195(5) Battery To An Unborn Child [Causing Great Bodily Harm With Intent To Cause Great Bodily Harm]
- § 940.30 False Imprisonment

- § 940.305 Taking Hostages
- § 940.31 Kidnapping
- § 941.32 Administering A Dangerous Or Stupefying Drug
- § 943.10 Burglary
- § 943.32 Robbery
- § 948.03 Physical Abuse Of A Child

2005 Wisconsin Act 434 also created subsection (6)(bm) to read:

(6)(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

Subsection 980.05(3)(b) provides that if the petition alleges one of these crimes, "the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated."

6. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

7. This is the definition provided in § 980.01(2). The Wisconsin Supreme Court found the definition "satisfies the mental condition component required by substantive due process for involuntary mental commitment." State v. Post, 197 Wis.2d 279, 303, 541 N.W.2d 115 (1995).

The Wisconsin definition of "mental disorder" is almost identical to the definition used in the state of Washington's Community Protection Act of 1990, which allows the commitment of "sexually violent predators." The Washington law uses the term "mental abnormality" where Wisconsin uses "mental disorder," but defines it as follows: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts." RCW 71.09.020(2). The Washington Supreme Court upheld the constitutionality of the predator provisions in In re Young, 857 P.2d 989 (Wash. 1993). A federal court in Washington found the definition to be inadequate because it created "an unacceptable tautology." Young v. Weston, 898 F. Supp. 744, 750 (D.C. Wash. 1995).

The Kansas Supreme Court has held that a similar definition of "mental abnormality" found in the Kansas Sexually Violent Predator Act failed to satisfy constitutional standards. In re Hendricks, 912 P.2d 129 (Kan. 1996). The United States Supreme Court reversed the state court decision. See Kansas v. Hendricks, 521 U.S. 346 (1997).

8. The phrase "and causes serious difficulty in controlling behavior" was added in February 2002 in response to the decision of the United States Supreme Court in Kansas v. Crane, 534 U.S. 407 (2002). Crane vacated a decision of the Kansas Supreme Court that held the Kansas "sexually violent predator" statute was unconstitutional because it did not require a finding that the individual could not control his dangerous behavior. The Kansas court concluded that Kansas v. Hendricks, 521 U.S. 346 (1997), required that finding. Crane held that Hendricks did not set forth a requirement of total or complete lack of control. "It is enough to say that there must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. 407, 413. The provisions of Wisconsin's Chapter 980 are similar to, though not identical with, the Kansas statutes reviewed in Crane. The Committee concluded that adding reference to "serious difficulty in controlling behavior" to the definition of "mental disorder" was an appropriate response to Crane.

On July 1, 2002, the Wisconsin Supreme Court decided State v. Laxton, 2002 WI 82, 254 Wis.2d 185, 646 N.W.2d 784. The court reaffirmed that Wisconsin's Chapter 980 is constitutional, held that a separate finding on difficulty in controlling behavior is not required, and held that a jury instruction without reference to "difficulty . . ." was not error: "In summary, we have concluded that civil commitment under Wis. Stat. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior. The requisite proof of lack of control is established by proving the nexus between the person's mental disorder and dangerousness." 2002 WI 82, ¶30.

The Laxton court acknowledged the February 2002 revision of Wis JI Criminal 2502 in a footnote:

> 14. We recognize that after Crane, Wisconsin Jury Instruction Criminal 2502 was revised to add language linking the mental disorder to the person's difficulty in controlling behavior. The revised jury instruction reads, in part:
>
> > "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. . . . Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior. Wis JI-Criminal 2502 (Special Release 2/2002) (footnotes omitted).
>
> The revised language was not used in Laxton's trial. Thus, we do not discuss the impact of the revised language, nor do we comment with either approval or disapproval of the revised language.
> 2002 WI 82, ¶24, footnote 14.

The Committee originally interpreted Crane as requiring that the "serious difficulty in controlling behavior" issue be communicated to the jury. Laxton clearly states that it need not be, because it is implicit in the other standards for a Chapter 980 commitment. Despite the decision in Laxton, the Committee decided to keep the Crane addition in Wis JI-Criminal 2502, concluding, in short, that it is prudent to make explicit what is implicit in the statutory standard.

The evidence was found to be sufficient in a post Laxton case in State v. Burgess, 2002 WI App 264, 258 Wis.2d 548, 654 N.W.2d 81. Also see State v. Tainter, 2002 WI App 296, 259 Wis.2d 389, 655 N.W.2d 538.

9. The 2011 revision changed the definition of "mental disorder" to make it more understandable to the jury and to address an inconsistency in the previously published version. In an unpublished decision, the Wisconsin Court of Appeals noted that the 2007 version of the instruction was "internally inconsistent" in its definition of "mental disorder," but concluded that the instruction as a whole properly conveyed the required elements. State v. Williams, No. 2010AP781, decided Nov. 18, 2010.

The source of the difficulty is that "mental disorder" is used as a term of art in Chapter 980 and has a specific definition – see § 980.01(2) – that is essential to the constitutionality of the sexually violent persons law. See State v. Post, 197 Wis.2d 279, 306, 541 N.W.2d 115 (1995). However, "mental disorder" is also the term used in a broader sense by mental health professionals to describe and categorize mental health-related symptoms. [See Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, American

Psychiatric Association (1994).] And, the term is one that lay persons, including jurors, may also use in a non-technical sense. The revised instruction acknowledges that the term "mental disorder" may have these other meanings in other contexts but emphasizes that "as used here" for purposes of Chapter 980 commitment, it must be given its specific Chapter 980 meaning.

In State v. Adams, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), the court found the evidence sufficient to establish "mental disorder" and held that an antisocial personality disorder can qualify as a "mental disorder" if it predisposes the specific defendant to sexual violence. In State v. Zanelli, 223 Wis.2d 545, 589 N.W.2d 687 (Ct. App. 1998), the court found that the evidence was sufficient to show "mental disorder" based on pedophilia and held that proof is not limited to literal compliance with the DSM IV criteria for pedophilia – the ultimate issue is whether a "mental disorder" is established.

"[T]he jury must unanimously agree that [the person] suffers from a 'mental disorder' that predisposes him to commit acts of sexual violence . . . [U]nanimity requirements are satisfied, even if jurors disagree as to which mental disease predisposes the defendant to recidivism." State v. Pletz, 2000 WI App 221, ¶19, 239 Wis.2d 49, 619 N.W.2d 97.

10. This statement is based on the one included in Wis JI-Criminal 605, Instruction on the Issue of the Defendant's Criminal Responsibility (Mental Disease). A slightly different version of this statement was cited in Post as an "apt analogy illustrating the need for separation between legal and medical definitions" when "descriptions designed for clinical use are transplanted into the forensic setting." State v. Post, supra, 197 Wis.2d 279, 305.

11. In State v. Bush, 2005 WI 103, 283 Wis.2d 90, 699 N.W.2d 80, the court made several general comments about proof of the "dangerousness" requirement: due process does not require proof of a recent overt act while on parole [¶29]; ". . . chapter 980 is reserved for only the most dangerous offenders" [¶32]; "predicting an offender's dangerousness under chapter 980 is a complex evaluation" [¶33]; an offender's behavior while incarcerated can be relevant to a determination of current dangerousness [¶37]; and, ". . . the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness." [¶38].

In State v. Sorenson, 2002 WI 78, 254 Wis.2d 54, 646 N.W.2d 354, the defendant contended it was error for the trial court to preclude him from introducing evidence relating to a prior conviction for a sexual offense in his Chapter 980 commitment trial. He sought to present evidence that the victim had recanted as part of a challenge to the claim that he suffered from a mental disorder and was dangerous. The Wisconsin Supreme Court remanded the case for a determination whether the recantation evidence "meets the test for newly discovered evidence sufficient to warrant a new trial." 2002 WI 78, ¶2. If it does, "any application of issue preclusion to exclude this evidence from Sorenson's ch. 980 trial would be fundamentally unfair. . ." 2002 WI 78, ¶25. [Note: Sorenson did not challenge the validity of the prior conviction. He sought to challenge its probative value as to the "mental disorder" and "dangerous to others" requirements.]

In State v. Olson, 2006 WI App 32, 290 Wis.2d 202, 712 N.W.2d 61, the court of appeals rejected a claim that the Chapter 980 definition "is unconstitutional because its definition of 'dangerousness' lacks a 'temporal context' limited to 'imminent danger.' . . . It is the propensity for sexual violence, not the precise point at which it may manifest itself, that makes the individual particularly threatening to society." ¶1.

Evidence of possible conditions of supervision is properly excluded from a commitment proceeding because it is not relevant to determining whether the person is a sexually violent person. State v. Mark,

2006 WI 78, ¶41, 292 Wis.2d 1, 718 N.W.2d 90.

12. 2003 Wisconsin Act 187 amended 980.02(2)(c) by replacing "creates a substantial probability" with "makes it likely." Act 187 also created 980.01(1m), which defines "likely" as "more likely than not." Rather than use "likely" and define it, the instruction uses "more likely than not" throughout. See the Comment preceding note 1, supra, discussing the effective date of the change. In State v. Nelson, 2007 WI App 2, 298 Wis.2d 453, 727 N.W.2d 364, the court of appeals held that the change from "substantially probable" to "likely" did not violate the person's rights to due process or equal protection.

A preceding version of this instruction defined "substantial probability" as "much more likely than not." See State v. Curiel, 227 Wis.2d 389, 597 N.W.2d 697 (1999). For cases finding the evidence sufficient to satisfy the "substantial probability" standard, see State v. Marberry, 231 Wis.2d 581, 605 N.W.2d 612 (Ct. App. 1999) and State v. Brown, 2002 WI App 260, 258 Wis.2d 237, 655 N.W.2d 157.

In State v. Smalley, 2007 WI App 219, 305 Wis.2d 709, 741 N.W.2d 286, the court of appeals concluded that it was error for an expert to testify that his understanding of "more likely than not" meant "more than zero." However, the court determined that this "isolated misstep did not prevent the real controversy from being tried." ¶2. The court elaborated on the meaning of "more likely than not":

> ¶12 "More likely than not" is not an obscure or specialized term of art, but a commonly used expression. It is hard to think of a clearer definition of the term than the term itself; though perhaps its expansion to "more likely to happen than not to happen" is more explicit. We find it difficult to imagine that any juror was without an understanding of the phrase's meaning before, during or after the trial, or that any juror thought the phrase meant something other than "more likely to happen than not to happen."

13. The 2007 revision added the reference to "one or more" acts. 2005 Wisconsin Act 434 amended the definition of "sexually dangerous person" in sub. (7) of § 980.01 as follows: ". . . and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." While the instruction does not directly use this definition, element 3. expresses the same concept, using the statement in § 980.02(2)(c): "The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence." Act 434 did not amend sub. (2)(c) to add the reference to "one or more." However, Act 434 amended § 980.05(3)(a) to read:

(3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving beyond a reasonable doubt that the person who is the subject of the petition is a sexually violent person.

The Committee concluded that this was a sufficient basis for adding the reference to "one or more" to the definition in the instruction.

14. This was originally the Committee's conclusion; it was not directly stated in the statutes. However, 2005 Wisconsin Act 434 created § 980.01(1b) to read as follows: "'Act of sexual violence' means conduct that constitutes the commission of a sexually violent offense." This is virtually the same definition adopted in the instruction.

This interpretation results in having "sexually violent offense" as a part of each of three parts of the jury's determination. First, the person must have had a prior conviction for a "sexually violent offense." Second, the person's mental disorder must predispose the person to engage in acts of sexual violence,

defined as "sexually violent offenses." Third, the person must be dangerous because he has mental disorder which makes it more likely than not that he will engage in acts of sexual violence, again defined as "sexually violent offenses."

15. The Committee assumes that most cases will involve reference to the same "acts of sexual violence" for the purposes of both the second and third factual determinations. See note 16. If they differ, or if it is believed necessary to describe the offenses specifically, the instruction should be tailored to refer to the different offenses that apply in each situation.

16. See note 4, supra, for the offenses specified in § 980.01(6)(a). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

17. See note 5, supra, for the offenses specified in § 980.01(6)(b). Since "mental disorder" is defined as a condition that predisposes a person to engage in "acts of sexual violence," it is apparently required that the predisposition go to one or more of the specific offenses that fit the statutory definition of "sexually violent offense." Thus, it may be necessary in some cases to refer to the elements of the offense.

18. This is the definition provided in § 980.01(5), as amended by 2005 Wisconsin Act 434. Act 434 amended the statute to include reference to "for the sexual humiliation or degradation of the victim."

19. The first sentence of the material in brackets is based on § 980.05(4) which provides that "[e]vidence that the person . . . was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder."

20. The explanation of the state's burden of proof is based on the standard instruction for criminal cases, Wis JI-Criminal 140 Burden Of Proof And Presumption Of Innocence. The concluding sentence of that instruction, which also appears here, was reviewed by the Committee in 2016. The Committee's conclusions, which also apply here, are described as follows in footnote 5, Wis JI-Criminal 140:

> In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." Also see, Manna v. State, 179 Wis. 384, 399 340, 192 N.W. 160 (1923).
>
> If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI Criminal 140:
>
> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.